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FILED
MAR 14 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 784

DOMINICK MARCONE,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Supreme Court of the United States:

Dominick Marcone, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on the 15th day of February, 1960, affirming a judgment of conviction of petitioner in the United States District Court for the Southern District of New York, dated July 6th, 1959.

Opinion Below

The opinion of the United States Court of Appeals which affirmed the judgment of conviction of petitioner, entered in the United States District Court for the Southern District of New York is not yet officially reported, —— F. 2d ——, United States Court of Appeals, Second Circuit Opin-

ion, October Term, 1959, No. 200, pages 761-765. A copy of such opinion accompanies this petition under the appendix annexed hereto.

The aforementioned opinion of the United States Court of Appeals and the judgment of affirmance based thereon, were dated and entered the 15th day of February, 1960, and affirmed the judgment of the United States District Court for the Southern District of New York, adjudging petitioner to be guilty on Count "2" of the Indictment herein, which charged petitioner and others of the crime of conspiracy to violate the Narcotics Law of the United States in violation of Sections 173 and 174 of Title 21, United States Code. Petitioner appeals from the judgment of conviction and sentence of eight (8) years imprisonment imposed against him. Petitioner was acquitted by jury verdict of the substantive charge of sale of narcotics as alleged in Count "1" of the Indictment. Petitioner is currently at liberty on bail pursuant to the issuance of a stay of the mandate, which was dated March 10th, 1960.

Jurisdiction

The judgment of affirmance of the United States Court of Appeals for the Second Circuit, which is sought to be reviewed herein was made and entered February 15, 1960. This judgment of affirmance affirmed the judgment of conviction in the United States District Court for the Southern District of New York, which adjudged petitioner herein guilty on Count "2" (conspiracy to violate the federal narcotics laws) Title 21, United States Code, Sections 173, 174 and whereon petitioner was sentenced to a term of eight (8) years imprisonment.

The jurisdiction of the United States District Court for the Southern District of New York, was invoked in view

of the fact that the crimes charged were violations of the Federal Laws allegedly committed within the Southern District of New York. The particular statutes involved are Sections 173 and 174 of Title 21, United States Code.

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28 U. S. C., Section 1254(1) on the ground that review by the Supreme Court of the United States by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

Certiorari is sought on the grounds that the United States Court of Appeals for the Second Circuit has rendered a decision on an important question of Federal Law in conflict with applicable decisions and controlling case law; has decided an important question of Federal law which should be clarified and made more definite and certain by this Court; has decided a Federal question of substance not theretofore determined by this Court; has decided said question is a way probably not in accord with the applicable decisions of this Court and with other Circuits; and/or because of the importance of the question for the administration of criminal justice in the Federal Courts.

Questions Presented for Review

(1) Whether petitioner was deprived of his liberty without due process of law when the jury's verdict was inconsistent?

(2) Whether the proof against petitioner, limited to one single isolated transaction, was a sufficient basis upon which to base an inference of continuing participation in a conspiracy?

(3) Whether the same proof adduced against petitioner, resulting in an acquittal on the substantive count, could be available against him to prove his participation in the lesser count of conspiracy?

(4) Whether a continuing conspiracy was proven and/or did a variance exist between the Indictment and the proof?

(5) Whether the effect of allowing the Indictment to be handed to the jury, to be read and taken into the juryroom, was prejudicial to petitioner?

(6) Whether reading of testimony which will co[illegible]ne considerable time, as requested by jury, did not j[illegible]fy Trial Court in refusing such request?

Statutory Provisions in Point

Title 21, United States Code:

> "Sec. 173. *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.* It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported. • • •"

"'Sec. 174. *Same; penalty; evidence*

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition may be fined not more than $20,000.

Whenever on trial for violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. * * *"

TITLE 18, UNITED STATES CODE

Section 2—*Principals:*

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Section 371—*Conspiracy to commit offense or to defraud United States:*

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

The Indictment

The indictment in this case contained two counts (6a-8a).[1] Count 1 alleged that on or about January 30, 1958, the appellant Dominick Marcone and co-defendant Paul Capalbo "unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of . . . approximately 17 ounces and 181 grains of heroin." Count 2 alleged a conspiracy to traffic in narcotics, from on or about January 1, 1958 and continuously thereafter up to and including the date of the filing of the indictment (which occurred on March 6, 1958), naming Dominick Marcone, Paul Capalbo, Alfred Sacco, Archangelo Noio, Joseph Barra, Thomas Grecco, Rocco Mazzie and "others to the Grand Jury unknown." A number of overt acts in furtherance of the alleged conspiracy were pleaded in the indictment, the latest date among them being February 21, 1958. It is not disputed that the conspiracy ended on February 21, 1958, the date of the arrest of a number of the defendants named in this count.

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[1] All numbers in parentheses refer to pages in Appellants' Appendix, unless otherwise indicated.

Concise Statement of Case

The Trial

The only persons tried on this indictment were appellant Dominick Marcone, and co-defendants Alfred Sacco and Archangelo Noio, who were separately appealing their convictions on count 2, the conspiracy charge. The trial of co-defendants Joseph Barra, Thomas Grecco and Rocco Mazzie, on count 2, was severed on motion of the government, and co-defendant Paul Capalbo entered a plea of guilty as to counts 1 and 2.

At the trial the government called as witnesses several agents employed by the Bureau of Narcotics. Of these, Agents Yannello (16a-78a), Mendelsohn (79a-82a), Zurlo (82a-94a) and Waters (94a-100a), gave testimony as to occurrences in New York City, while the remaining witnesses, Agents Przibórowski (100a-113a) and Hipkins (113a-125a) were called to testify concerning occurrences in San Francisco, California only. The defendants Marcone (16a-190a) and Sacco (190a-204a) each testified on his own behalf, while Noio did not testify.

The jury acquitted appellant Dominick Marcone of the charge in count 1, the sale of 17 ounces and 181 grains of heroin, but convicted him of conspiracy to traffic in narcotics, count 2 of the indictment (235a). The co-defendants Sacco and Noio were both convicted of the conspiracy count (235a). The United States Court of Appeals for the Second Circuit reversed Sacco and Noio's judgments of conviction when the Government confessed error.

The Government's Case Against Petitioner

Agent Yannello, the first government witness, testified that while working at his duties in San Francisco, Cali-

fornia, on January 27, 1958, he met co-defendant Paul Capalbo (who pleaded guilty to both counts of the indictment). Present also at this meeting was a so-called "special employee" named Don Meyer (16a). At this meeting, Meyer introduced Capalbo and Yannello to each other (18a), Yannello stated to Capalbo that he has heard that the "price has gone up a thousand dollars to seven thousand" (18a), to which Capalbo replied, "That's right." Capalbo then stated that he had called his source of supply in New York and learned of the increase in price, and that any narcotics Yannello purchased from Meyer were obtained through him (Capalbo) (18a).

Capalbo then asked Yannello how soon he could leave for New York, and it was agreed that they, without Meyer, would leave from San Francisco International Airport the following night, January 28, 1958 (19a). They departed for New York, via United Airlines, arriving at Idlewild Airport at 6:45 a.m., the morning of January 29, 1958 (19a). By previous arrangement Agent Mendelsohn, acting as a taxi driver, picked the two men up at Idlewild Airport and drove them to the apartment of Agent Zurlo in Jackson Heights. During the ride to Zurlo's apartment Capalbo stated that he "felt that there would be no trouble in getting the narcotics in New York, and stated he had lived here for many years and knew many people" (20a)[2]. At

[2] Both Agent Yannello and Agent Mendelsohn, acting as the cab driver, made it a point to testify that Capalbo pointed out New York's "little Alcatraz", Riker's Island, on the ride from Idlewild Airport to Jackson Heights (20a, 80a). Of course on such a trip one cannot possibly see Riker's Island from the section of Queens County traversed, and it is suggested that this part of the testimony was added to the real facts of the case only to show Capalbo's ostensible familiarity with a local jail, so as to give atmosphere to the trial. Also, it was probably added to the testimony of both witnesses in order to show separate versions of the same alleged conversation.

the Zurlo apartment in Jackson Heights, Yannello was let out of the taxi, and at that time Capalbo gave Yannello his sister's telephone number, while Yannello gave Capalbo Zurlo's telephone number, so that they could contact each other. Then Mendelsohn drove off in the taxi with Capalbo, dropping him off at another address in Jackson Heights (20a-21a, 81a).

Later during that day Capalbo telephoned Yannello at Zurlo's apartment several times stating that he had met various people and the only question was his attempt to get pure narcotics, and everything was coming along fine. That night Capalbo telephoned again and arranged to pick Yannello up. Upon meeting Yannello, Capalbo was driving an automobile and they drove together to a parking lot at the Star-Light Cafe on Astoria Boulevard. While they sat in the car Capalbo asked for the money and Yannello gave him $7,000. They left the car and walked toward the cafe. On the steps Capalbo looked in and then said, "Let's go." They walked a block away and another car drove up. Capalbo and Yannello entered the car and Capalbo then introduced Yannello to "Danny", the appellant Marcone (21a).

Yannello testified that in the car Capalbo asked Marcone if he brought the "stuff" with him, to which Marcone replied, "No", stating that they would have to go and get it. Marcone then queried Yannello as to how long he had known Capalbo and upon learning it was only a few days, stated that it was "an awfully short time to know somebody and be doing business with him", to which Capalbo replied, "He comes very highly recommended" and "he's all right" (22a). Marcone then said they would go for a drive and drop Yannello off, and that they would continue on, with Capalbo returning with the narcotics. They drove on, and then dropped Yannello off at the Under Den Linden Restaurant in the Bronx, and then Marcone and Capalbo drove

off. Approximately 30 minutes later Capalbo returned with a bag. Yannello and Capalbo took a bus to a taxi stand and there they took a taxi back to the Star Light Cafe. At the Star Light Cafe Capalbo left the cab and the bag, containing narcotics, remained with Yannello (22a-23a). The next day they flew back to San Francisco (26a).

After returning to San Francisco, Yannello and Capalbo made arrangements for further trips to New York. On February 11, 1958, Yannello telephoned Capalbo, they met and arranged to fly to New York that night to make another purchase of a half of a kilo for $7,000. (31a). They arrived in New York at 7:45 a.m. on February 12, 1958 and were met at the airport by Agent Zurlo (32a). Capalbo made a telephone call and a woman by the name of Millie answered the phone. Capalbo asked for Danny and then spoke to Danny. Yannello and Zurlo drove Capalbo to the vicinity of 903 Summit Avenue, Bronx, New York,[1] and Capalbo left the automobile. Capalbo had in his possession $6,700 which Yannello had given him (33a). Yannello and Zurlo then returned to Zurlo's apartment.

At about 10 o'clock in the morning of February 12, 1958, after Zurlo and Yannello returned to Zurlo's apartment, Capalbo telephone and stated to Zurlo, "that everything was all-right, and he expected that they would be on the plane leaving at 1:30 again for California, that he would call again a little later" (84a). Thereafter at about 2:30 p.m. Capalbo called again and this time spoke to Yannello, telling him that they were having a little trouble and that "something was fishy" (34a). At about 8 o'clock that night Capalbo and Marcone came to Zurlo's apartment. They were apparently excited and asked Zurlo and Yan-

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[1] 903 Summit Avenue, Bronx, N. Y., is the home of appellant Marcone (175a).

nello what they were doing to them. Yannello and Zurlo wanted to know what they meant and Marcone stated: "There's been a lot of heat. We have been followed ever since you left us this morning" (85a). Both agents testified that Marcone stated that he had obtained the license number of one of the surveilling cars and through a friend of his had found out that the car belonged to the federal government (35a, 86a).[4]

Capalbo and Marcone then left the apartment and Zurlo and Yannello remained there until about 3 a.m. on the morning of February 13. When Capalbo returned, he stated:

> "That there was so much heat that he couldn't deal with the same people, but he had met some other people who were going to send a half kilo out to California, and that Agent Yannello would be able to get it out there, and at the same time he returned a sum of money to Agent Yannello." (86a)

Thereafter Zurlo and Yannello drove around New York with Capalbo until 9 a.m., at which time Capalbo alone returned to San Francisco by plane.

The following day Yannello also returned to San Francisco and again communicated with Capalbo and new arrangements were made for different persons to deliver a half kilo of narcotics to Yannello in San Francisco. Co-defendants Sacco and Noio came to San Francisco with a bag containing flour (112a). No narcotics were ever discovered in connection with Sacco and Noio and no connec-

[4] It is undisputed that February 12, 1958 was a legal holiday in New York State and that the Bureau of Motor Vehicles of the State of New York was closed on that day and there was no possible way for anyone to learn the identity of federally owned law enforcement vehicles. Information of such registration is not available to the public (88a-90a).

tion between Marcone and Sacco and Noio was ever established, except that Capalbo ostensily made the arrangements for Sacco and Noio to go to California with the bag of flour.

Agent Waters testified that he was employed in the New York office of the Bureau of Narcotics and that he conducted a surveillance of Capalbo's activities in New York City (94a-98a). On the occasion of the January 29th visit to New York, Waters followed Capalbo to 91st Street in Jackson Heights, after Yannello alighted from Mendelsohn's taxicab. On two separate occasions, during the same day, Waters followed Capalbo to East Harlem and then back to 91st Street, his sister's residence (95a).

That evening Capalbo drove from his sister's house to 903 Summit Avenue, in the Bronx, where he entered Marcone's apartment. He remained there several hours leaving alone and driving out to the Star Light Cafe. He entered the Cafe, made a telephone call, then left the Cafe and drove to Zurlo's home where he was joined by Yannello. Together they drove back to the Star Light Cafe, where they parked the car being driven by Capalbo and were then picked up in another car driven by Marcone. At about midnight Yannello and Capalbo returned to the Cafe in a taxicab (96a).

Waters testified that on February 12, 1958, he observed Zurlo meet Capalbo and Yannello at Idlewild Airport and followed them to Zurlo's home. They remained there a short time and then drove to 903 Sunimit Avenue in the Bronx, where Capalbo alighted and entered Marcone's home (97a). Marcone was observed to leave his apartment and drive his car to several places in the Bronx and was seen to converse with co-defendants Grecco and Mazzie (as to whom the trial was served). Thereafter Marcone returned to his home at about 11 o'clock in the morning. Marcone and Capalbo left Marcone's apartment, got into his

car and then drove around New York on a tour (98a). They drove for hours and then went back to Zurlo's apartment. Shortly thereafter Marcone left Zurlo's apartment, got into his car and drove off and the surveillance was discontinued (98).

Defense Witness

Marcone testified as a witness in his own behalf. He testified that he was living on a disability pension after having been wounded in combat during World War II in the Battle of the Phillipines. His pension is a 100% disability pension, and since this was insufficient to support his family, he was supplementing his pension by being a bookmaker on horse races. His regular occupation was as a salesman in plumbing supplies, but for 6 or 7 years he had been unable to follow this profession because of his disability. Marcone testified that he had known Capalbo since they were children and that he had seen him from time to time several years after he had returned from service (162a-163a).

As to the transactions in question in this case, Marcone testified that Capalbo, whom he had not seen for several months, telephoned him after he arrived in New York and asked to meet him at the Star Light Cafe so that they could go out together and have a few drinks. Upon going to the cafe Marcone waited for Capalbo, but he did not appear and finally as he was driving away to return home he observed Capalbo and Yannello about two blocks away from the Star Light Cafe. He picked them up and they drove to the Bronx. Marcone denied that during this drive there was any question such as "did you bring the stuff", or any other discussion concerning narcotics. Rather, while driving to the Bronx, he (Marcone) asked Capalbo whether Yannello was one of his partners in his bar and grill in San Francisco, to which the reply was "No." The reason that Yannello left the car at the Unter Den

Linden Restaurant was that he stated that he had not eaten that evening, and that this was the first restaurant off the highway at Pelham Parkway in the Bronx at which they could stop. Capalbo continued on in the car with Marcone. They stopped at a place called the Chateau Pelham, where they had a few drinks, and then Capalbo made a call, after which Capalbo asked Marcone to lend him his car, which Marcone did not do. Thereupon Marcone went home and left Capalbo a few blocks from his (Capalbo's) brother's house.

Thereafter on February 12, 1958, Capalbo telephoned Marcone in the morning telling him, that he had just returned from California and asking if he could come up for breakfast. While there Marcone told Capalbo that he had to go to work and thereupon he went around to see several of his bookmaking customers. It was during this time that he observed an automobile following him constantly, and very obviously behind him at all times (171a). When he took Capalbo in the car with him and told him that he believed he was being followed, he asked Capalbo if he was in any kind of trouble when he came in from California, "Because if you are . . . tell me about it. This way I'll know what to expect" (172a). They then drove to Zurlo's home where Marcone asked Yannello in Zurlo's presence if they were in any trouble, to which Yannello stated: "Well, I hope you didn't bring any trouble over here." Marcone then replied:

> "Look, I don't know if you and Paul (Capalbo) are up to anything, but if you are", I said, "I want it understood right here, I want nothing to do with it. Do you understand?" (173a)

Marcone testified that he had never stated that he had the car following him checked and learned that it was a car belonging to a federal agency (173a).

Marcone admitted that in 1941, prior to his military service, he was convicted of petit larceny and assault in the Court of Special Sessions of Bronx County, for which he was away for 15 months, and that on 3 or 4 occasions he was convicted of taking bets on horses, for which he paid fines (174a-175a). Marcone also testified that he did not know the other defendants in this case and had never met them prior to the time this case commenced (189a).

The jury acquitted Marcone of Count 1 and convicted him of Count 2, the conspiracy count; and it also convicted Sacco and Noio of Count 2. The writer represented Sacco and Noio on the appeal from their judgments of conviction, in the United States Court of Appeals and now represents petitioner Marcone.

Reasons Relied on for the Allowance for the Writ of Certiorari

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POINT I

Petitioner was deprived of his liberty without due process of law when the jury's verdict was inconsistent.

The evidence introduced by the government in support of its prosecution against appellant Marcone is set out in detail above. From this evidence it is clear that the government relied upon the same factual circumstances to prove its case against Marcone, both as to the substantive count of selling 17 ounces and 181 grains of heroin and as to the conspiracy count. Of course, the conspiracy allegation goes beyond the evidence introduced against Marcone, and it is not disputed that Marcone had no part or connection with any of the events relating to Sacco and Noio in San Francisco. Accordingly it will be argued herein that there was

no proof connecting Marcone to the events in San Francisco subsequent to Capalbo's return there on February 13, 1958. The record of the trial supports this argument.

Marcone's connection with the substantive count was attempted to be established by the events of the January 29th, 1958 trip to New York by Capalbo and Yannello. It was during this trip that narcotics was in fact delivered by Capalbo to Yannello in the taxi-cab in the Bronx as they returned to Queens. The jury acquitted Marcone of this charge, and thus the facts necessary to prove this count as to him are conclusively and irrefutably established against the government. *Sealfon* v. *United States*, 332 U. S. 575; *United States* v. *Oppenheimer*, 242 U. S. 85; *Williams* v. *United States*, 179 F. 2d 644, 650 (C. A. 5th), affirmed on other grounds, *United States* v. *Williams*, 341 U. S. 70; *Yawn* v. *United States*, 244 F. 2d 235 (C. A. 5th). Such facts may not be relied upon by the government in its attempt otherwise to establish Marcone's participation in or connection with the conspiracy alleged in this indictment.

In the *Sealfon* case, *supra*, the Supreme Court held that proof of the facts alleged in the overt act in the conspiracy case cannot be permitted to establish the overt act on which conviction of conspiracy must depend, where there has been an acquittal on the same facts charged in a substantive count. In this case the sole proof of conspiracy to traffic in narcotics, upon which such charge must rest, is the narcotic evidence delivered to Agent Yannello by Capalbo. Since Marcone has been acquitted of that substantive count, such proof is not available against him to prove his participation in the conspiracy count.

It is not suggested that the acquittal of a substantive count requires the acquittal of a related conspiracy charge, for surely there may be other proof of conspiracy, and of a defendant's connection with or participation in such con-

spiracy. Here, however, the only other proof of Marcone's connection with any alleged conspiracy is the events of February 12, 1958, where Marcone found he was being trailed by a strange automobile, and he angrily asked Capalbo and Yannello if they were involved in something illegal; for if not he wanted "nothing to do with it" (173a). Marcone's actions of that day were clearly consistent with innocence and not proof of any participation in a conspiracy. *United States* v. *Di Re*, 332 U. S. 581, 593-594.

The government's proof of Marcone's participation in the substantive count was that of "aiding and abetting" in its commission. Title 18, United States Code, Section 2, *supra*. The trial judge charged the jury on this theory (222a), and there was no independent substantive proof of Marcone's participation in the substantive offence. However, the law is well settled that proof of "aiding and abetting" may be supplied by a defendant's participation in a conspiracy. *Pinkerton* v. *United States*, 328 U. S. 640; *Nye and Nissen* v. *United States*, 336 U. S. 613. Here it was the same proof that was relied upon to establish both the substantive crime and the membership in the conspiracy insofar as Marcone was concerned. The second overt act pleaded in the conspiracy count (7a), supports this view, for it alleges a conversation between Marcone and Capalbo in the vicinity of the Unter Den Linden Restaurant, in the Bronx, on January 29, 1958, as being in furtherance of the conspiracy, as well as being the evidence of Marcone aiding and abetting Capalbo in the sale of narcotics. See the prosecutor's summation, page 206a and the trial judge's charge, page 222a. Thus the acquittal of Marcone of the substantive offense eliminates this proof for the purpose of sustaining the conspiracy charge as to Capalbo.

In *Pereira* v. *United States*, 347 U. S. 1, 11-12, Chief Justice Warren wrote as follows:

> "Thus the charge of conspiracy requires proof not essential to the convictions on the substantive offenses—proof of an agreement to commit an offense against the United States—and it cannot be said that the substantive offenses and the conspiracy are identical, any more than that the two substantive offenses are identical."

Since the only proof of Marcone's participation in the conspiracy is the allegation of the substantive offense, there is no credible evidence in this record available to sustain this conviction.

It does not seem to matter that both the substantive and conspiracy counts were tried together, resulting in an apparently inconsistent verdict, a difference from the usual double jeopardy situation, where there are successive prosecutions. The important fact is that the essence of the proof of the conspiracy charge against Marcone is eliminated as proof against him by his acquittal of the substantive charge. In other words, proof of Marcone's agreeing with the co-conspirators, such as Capalbo, is eliminated by the fact that the evidence to support this agreement is not available as such for this purpose. *Sealfon* v. *United States, supra*, 578-579; *United States* v. *Maybury*, —— F. 2d ——, unreported to date, United States Court of Appeals, Second Circuit Opinions, October Term, 1959, No. 172, pages 635-652.

POINT II

The proof as against the petitioner Dominick Marcone was limited to one single isolated transaction and is an insufficient basis upon which to base an inference of continuing participation in a conspiracy.

A reading of the decision of the Court of Appeals shows that said Court in reviewing the evidence with regard to the petitioner, and accompanying this petition hereinbefore referred to, dealt with one single transaction that allegedly took place on February 12, 1958. It is quite apparent from a reading of the opinion that the said Court in deciding the appeal disregarded controlling Case Law in said Circuit as enunciated in *United States* v. *Stromberg*, 268 Fed. 2nd 256 (U. S. C. A. 2nd, decided June 15, 1959), wherein said Court of Appeals in reversing a conviction of the appellant, Saul Snyder, for conspiracy to violate the Narcotics Laws of the United State, restated the one transaction doctrine that had previously been obiter as follows at page 267:

> "We also think that the conviction of the appellant Snyder must be reversed. At the trial, it was stipulated that Snyder had been introduced to either Aron or Baruche in 1949, before the conspiracy began. Aside from this, which standing alone was insufficient to support a conviction, the only incident connecting Snyder with the conspiracy is the delivery of two suitcases, later found to contain heroin, to Vellucci and Ewing in Hoboken. In United States v. Reina, 2 Cir., 242 F. 2d 302, certiorari denied *sub nom* Moccio v. United States, 354 U. S. 913, 77 S. Ct. 1294, 1 L. Ed. 2d 1427 we held that participation in a single isolated transaction was an insufficient basis upon which to bottom an inference for continuing participation in a con-

spiracy. For aught that appears in this record, this was Snyder's only transaction with the group; under the reasoning of the Reina case, the evidence is insufficient to support the inference that Snyder knew or accepted the conspiratorial aims or that his participation went beyond the single transaction."

(See also *United States* v. *Reina*, 242 F. 2d 302, U. S. C. A. 2d 1957.)

Nowhere in the record is there any proof of the petitioner's connection with any of the other transactions alleged at the trial nor was there any contention by the Government that he was involved in the other transaction. The Government's proof as to petitioner Marcone is limited to February 12, 1958.

It appears quite obvious that the Court of Appeals in its opinion affirming the conviction of petitioner was either not aware of or it overlooked the controlling case law of said Circuit as hereinbefore enunciated.

POINT III

The same proof adduced against petitioner, resulting in an acquittal on the substantive count, could not be available against him to prove his participation in the lesser count of conspiracy.

It has long been recognized that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. *Pinkerton* v. *U. S.*, 328 U. S. 640, 643; *United States* v. *DeAngelo* (C. C. A. 3d N. J.), 138 F. 2d 466, 468; annotation in 147 A. L. R. 991; see *Frank* v. *Mangum*, 237 U. S. 309, 334, 59 L. ed. 969, 983, 35 S. Ct. 582 and operates to conclude those matters in issue which

the verdict determined though the offenses be different. See *United States* v. *Adams*, 281 U. S. 202, 205, 74 L. ed. 807, 808, 50 S. Ct. 269. Thus, with some exceptions one may be prosecuted for both crimes. Ibid. But res judicata may be a defense in a second prosecution. That doctrine applies to criminal as well as civil proceedings (*United States* v. *Oppenheimer*, 242 U. S. 85, 87.

Thus the question in this case is whether the jury's verdict in the conspiracy trial was a determination favorable to petitioner of the facts essential to conviction of the substantive offense. The verdict established with certainty that petitioner was not a member of such conspiracy. So interpreted, the verdict of "not guilty" of the substantive offense precluded a conviction of the conspiracy charge. The core of the prosecutor's case was in each case the same; the circumstances surrounding it and to be inferred from it.

The conspiracy charge was a second attempt to prove the substantive offense. It was crucial to the prosecution's case and which was neecssaritly adjudicated by the jury's acquittal to be non-existent. That the prosecution may not do.

Where, as here, the substantive offense was the overt act necessary to sustain conviction on the conspiracy count, an acquittal of the substantive offense operated as an acquittal of the conspiracy count, especially so, if the acquittal of the substantive offense constituted a determination that the overt act was not completed.

Thus, in *Re Johnston* (1935), 3 Cal. 2d 32, 43 P. 2d 541, the acquittal of defendants on several counts in an indictment was held to preclude conviction on a count charging a conspiracy to violate the act, which set forth as the overt acts the crimes charged in the substantive counts notwithstanding the provisions of their law that an acquittal of

one or more counts shall not be deemed or held to be an acquittal of any other count. The Court there said that the determination of the jury that none of the overt acts were committed constituted an acquittal on the conspiracy charge, since one of the overt acts had to be proved to permit conviction of the conspiracy. To the same effect see *Oliver* v. *Superior Ct.* (1928), 92 Cal. App. 94, 267 P. 764. Compare *United States* v. *Dewinsky* (1941; D. C. N. J.), 41 F. Supp. 149, in which the Court seemed to give consideration to the contention that a verdict of guilty on a conspiracy count was inconsistent with the verdict of not guilty on substantive counts.

In *Com.* v. *Altland* (1922), 79 Pa. Super. 43, an accused had been acquitted of the substantive offense of intent to defraud creditors, it was held that he could not be convicted on a charge of conspiracy with others to defraud his creditors solely upon evidence that he was present and taking part when the goods in question were being secreted.

Where the substantive offense is the overt act necessary to sustain conviction on the conspiracy count, an acquittal of the substantive offense may operate as an acquittal on the conspiracy count, if acquittal of the substantive offense constitutes a determination that the overt act was not committed. This is so especially where the gravamen of the conspiracy charge and the substantive charge is the same agreement (*Sealfon* v. *United States, supra*), or concert of action (*Com. v. Altland, supra*).

The Court below erred in sustaining the judgment of conviction upon an indictment which charged one conspiracy where the proof conclusively showed multiple conspiracies and where in submitting the case to the jury, the Trial Court authorized the jury to find that only a single conspiracy existed.

POINT IV

No continuing conspiracy was proven and a variance existed between the indictment and the proof.

If petitioner had been tried solely for the February 12th conspiracy, the admission of evidence relating to the later conspiracy of February 15th to the 20th it would have constituted prejudicial error. Similarly, if petitioner had been tried for the later conspiracy, evidence of earlier illegal acts would have been seriously prejudicial. In the present case there is not only a absence of evidence indicating that petitioner was a member of any conspiracy that was in existence but the record tends to indicate that a jury verdict acquitted petiitoner of the substantive count in the indictment while the Government confessed error as to the sole remaining co-defendants, Sacco and Noio, who were tried with petitioner. Sacco and Noio's judgments were reversed and their indictments were dismissed. Upon oral argument in the Court below, the Government freely admitted that Sacco and Noio, after an exhaustive investigation, found they were never involved in any conspiracy. Under such circumstances a prejudicial variance existed between the proof and the indictment. *United States* v. *Russano*, 257 F. 2d 12.

The proof offered against the co-defendants Sacco and Noio was received against appellant Marcone, under the allegations of the conspiracy count, on the theory that all were engaged together in one single continuous conspiracy. In this regard the testimony of Agent Zurlo is important. After the scene where Marcone stated he wanted nothing to do with Yannello and Capalbo if they were engaged in something illegal (173a), Capalbo returned alone to Zurlo's apartment. Zurlo then testified as follows:

"Q. And what happened at that particular time. A. At this time Capalbo stated that there was so much heat that he couldn't deal with the same people, but he had met some other people who were going to send a half kilo out to California, and that Agent Yannello would be able to get it out there, and at the same time he returned a sum of money to Agent Yannello." (86a)

On cross examination Zurlo testified as follows:

"Q. Do you recall the time on February 12th when Capalbo returned the money to Yannello? A. Yes, sir.

Q. And at that time did he say anything about having made a new contact or a new source of supply? A. Yes, he said because of the heat he had seen some other people, that they were going to get some stuff the following day in California.

* * * * *

Q. But he said he had made new contacts? A. He just said he had made new contacts." (92a)

Thus it is apparent that Marcone, if he ever was Capalbo's "source of supply" in New York, was no longer that source of supply, and that in going to "some other people", Capalbo transferred to a new group different and unrelated to the prior group. Under such circumstances Marcone and Sacco and Noio were not members of the same conspiracy. *Kotteakos* v. *United States*, 328 U. S. 750; *United States* v. *Russano*, 257 F. 2d 712 (C. A. 2d); *Canella* v. *United States*, 157 F. 2d 470 (C. A. 9th); *Brooks* v. *United States*, 164 F. 2d 142 (C. A. 5th). Note, *Federal Treatment of Multiple Conspiracise*, 57 Col. Law Rev. 387 (1957).

Prejudice to Marcone's cause by the admission of the proof against Sacco and Noio is apparent. They were engaged in a plan to swindle Yannello out of a large sum of money by delivering a bag of flour to him, and the obvious fraud they were perpetrating could only prejudice them in the eyes of the jury (192a). Under the government's theory of this case, Marcone was treated as a part of this swindle, and his position was that of being considered as among "birds of a feather" (*Krulewitch* v. *United States*, 336 U. S. 448, 454 (concurring opinion). The evidence introduced does not bear out or support this government theory, but the atmosphere engendered on the trial lingers as a substitute for the proof.

POINT V

The effect of allowing the Indictment to be given to the jury to be read and taken into the juryroom was prejudicial to petitioner.

The indictment was handed to the jury by an officer of the court (and later taken into the juryroom with other papers for consideration) (234a), and that on the back of the indictment were the names of several co-defendants who were then being publicized in the newspapers. The infamous co-defendants were severed from the trial of the instant indictment. It was the right of petitioner that his case should be submitted to the jury free from influence naturally produced by the fact of the notorious co-defendants endorsed upon the same indictment. The effect of bringing that fact prominently and authoritatively to the attention of the jurors could only be prejudicial to petitioner. The indictment was read by all the jurors as it was circulated throughout all of the jurors. The fact that indictment papers containing such obnoxious names were handed

to the jury could hardly fail to give the jury the impression that they were intended for their consideration, and that they were expected to have some weight in forming their verdict.

Trial by jury is properly surrounded by every reasonable safeguard, to insure the absence of any improper influence that might operate upon the minds of the jurors, and give to their verdict the dignity and respect so important to be maintained in the interests of an impartial administration of justice. *Ogden* v. *United States*, 112 F. 523-527.

POINT VI

Fact that reading of testimony requested by jury will consume considerable time did not justify Trial Court in refusing such request.

The fact that the reading of the testimony requested by the jury would have consumed considerable time (233a) did not justify the Trial Court in refusing such request (*United States* v. *Campbell*, 138 F. Supp. 344, 347). In the case of *State* v. *Palmer*, 1952, 173 Kan. 560, 251 P. 2d 225, the Kansas Supreme Court stated, 251 P. 2d at page 232:

> "• • • and were informed by the bailiff that it would take two to three hours to read the testimony • • •. At any time a jury feels the need of hearing testimony read the request should not be refused because of the time it would take to read the testimony."

From all of the foregoing it appears that the Court below was either unaware of, or overlooked the controlling case law of the Second Circuit as hereinabove enunciated.

CONCLUSION

The petition for certiorari should be granted and this Court in the exercise of its powers should order the judgment of conviction of the petitioner herein reversed and the matter remanded to the appropriate Court to be dealt with accordingly.

Respectfully submitted,

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Attorney for Petitioner,
401 Broadway,
New York 13, New York.

APPENDIX

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 290—October Term, 1959.

(Argued January 1, 1960 Decided February 15, 1960.)

Docket No. 25849

UNITED STATES OF AMERICA,

Appellee,

—v.—

DOMINICK MARCONE, ALFRED SACCO and ARCHANGELO NOIO,

Appellants.

Before:

CLARK, HINCKS and WATERMAN,

Circuit Judges.

Appeals from the United States District Court for the Southern District of New York, J. Skelly Wright, *Judge*, by Dominick Marcone, Alfred Sacco and Archangelo Noio, from conviction on trial to a jury of conspiring to violate federal narcotics laws, 21 U. S. C. A. §§173 and 174. Affirmed as to Marcone; reversed as to Sacco and Noio.

DANIEL H. GREENBERG, New York, N. Y. (Samuel W. Altman, New York, N. Y., on the brief), *for appellant Dominick Marcone.*

FRANCES N. KAHN, New York, N. Y., *for appellants Alfred Sacco and Archangelo Noio.*

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JOHN S. CLARK, Asst. U. S. Atty., Southern District of New York, New York, N. Y. (S. Hazard Gillespie, Jr., U. S. Atty., and Otis Pratt Pearsall, Asst. U. S. Atty., S. D. N. Y., New York, N. Y., on the brief), *for the United States.*

HINCKS, *Circuit Judge*:

The appellant Marcone, with his codefendant Capalbo, was charged in a two-count indictment (1) with the sale on or about January 29, 1958 of narcotics in violation of 21 U. S. C. A. §§173 and 174, and (2) with conspiracy from January 1, 1958 to the date of the indictment, March 6, 1958, to violate §§173 and 174. The charges against several of the originally named defendants were severed and the codefendant Capalbo pleaded guilty on both counts. The others, Sacco and Noio, who were charged only in the conspiracy count, were tried, together with Marcone, before a jury which returned verdicts of guilty against all three on the conspiracy count: on the sale count the jury returned a verdict of not guilty as to Marcone. The three defendants thus convicted have appealed. As to Sacco and Noio, the Government confesses error. We agree that as to them there was insufficient evidence to support the convictions. Accordingly, as to Sacco and Noio the judgments of conviction are reversed with a direction that the indictment be dismissed. We turn now to consider Marcone's appeal.

The appellant's principal contention is that his acquittal on Count 1, charging a sale on January 29, 1958, requires a reversal of his conviction on the conspiracy charge. This is so, he argues, because the only evidence supporting his

conviction of conspiracy is the same evidence as that adduced in support of Count 1, and since his acquittal on Count 1 constituted a determination that he neither par-

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ticipated nor aided in the sale of January 29, the evidence connecting him with the sale (to quote from his brief) "is not available against him to prove his participation in the conspiracy." For this proposition the appellant relies on *Sealfon* v. *United States*, 332 U. S. 575, and *United States* v. *Oppenheimer*, 242 U. S. 85.

There are at least two factors in this case which completely undermine the appellant's position. First is the fact that the verdict of acquittal on Count 1, which is stated to preclude the verdict of guilty on Count 2, was returned by the same jury after a single trial on both counts. In the *Sealfon* and *Oppenheimer* cases, it was held only that facts determined by an acquittal in one trial precluded conviction *in a subsequent trial* based on the same facts. That is not the situation here where both verdicts were returned by the same jury in a single trial. To such a situation it is well established that the *Sealfon* rule does not apply. *United States* v. *Coplon*, 2 Cir., 185 F. 2d 629, 633, cert. denied 342 U. S. 290; *Ross* v. *United States*, 6 Cir., 197 F. 2d 660, cert. denied 344 U. S. 832. Cf. *Dunn* v. *United States*, 284 U. S. 390.

Second. The premise underlying the appellant's argument is false. For quite aside from the evidence relating to the January 29 sale there was sufficient additional evidence of a conspiracy between Marcone and Capalbo; e.g., in the evening of February 12, 1958 the appellant was engaged in a highly incriminating conversation with his co-conspirator Capalbo and the federal agents. This evidence was enough to support a finding that the appellant was a member of the alleged conspiracy and on such a finding numerous declarations by Capalbo incriminating the appel-

lant became admissible against the appellant. It just is not so that the only evidence of the conspiracy was that relating to the January 29 sale.

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Thus in this respect also this case differs from *Sealfon* v. *United States, supra.* For here it is clear that the acquittal on the substantive offense charged to have occurred *on January 29* could not possibly be "a determination favorable to the petitioner of the facts essential to conviction"[1] of a conspiracy charged to have continued *subsequent to January 29.* Nor does the acquittal on Count 1 involve a determination adverse to the Government of the facts constituting the overt acts charged in the conspiracy count.

We conclude, therefore, that the case here is ruled not by *Sealfon* but by cases such as *United States* v. *Rabinovich,* 238 U. S. 78; *Dunn* v. *United States, supra; United States* v. *Winters,* 2 Cir., 158 F. 2d 674; *United States* v. *Rainone,* 2 Cir., 192 F. 2d 860; *Steckler* v. *United States,* 2 Cir., 7 F. 2d 59; *Shayne* v. *United States,* 9 Cir., 255 F. 2d 739, cert. denied 358 U. S. 823. Cf. *Pereira* v. *United States,* 347 U. S. 1, 11-12. The reasoning in all three of the opinions in *United States* v. *Maybury,* 2 Cir., —— F. 2d ——, January 27, 1960, supports this conclusion.

The appellant's only other ground of appeal is that it constituted prejudicial error to try the appellant Marcone with the other appellants (Sacco and Noio) who at most, now it is asserted, were members of a separate, unrelated conspiracy. For this position the appellant invokes *Kotteakos* v. *United States,* 328 U. S. 750, and *United States* v. *Russano,* 2 Cir., 257 F. 2d 712. But neither case, we hold, is pertinent to the situation here. For there was abundant evidence here of a conspiracy between the appellant and Capalbo as middlemen in the distribution of nar-

1 *Sealfon* v. *United States, supra,* pages 378-379.

cotics, which continued on well into February, 1958. And the mere fact that the Government failed to prove that Sacco and Noio were members of the conspiracy charged, as by its confession of error it now concedes, did not constitute reversible error as to the appellant. Sacco and Noio

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both testified in their own defense but neither implicated the appellant. Nor did the Government's witnesses testify to declarations made by Sacco and Noio which incriminated the appellant. It is true that there was evidence both from the Government and from Sacco and Noio themselves that the latter had attempted to swindle a Government narcotic agent by a sale of flour disguised as a narcotic. But in view of the damning evidence which linked the appellant with the conspiracy to traffic in narcotics, evidence of the projected but unsuccessful swindle, even if shown to have been connected with the appellant, could scarcely have constituted serious prejudice.

Affirmed as to Marcone; as to Sacco and Noio, reversed with a direction to dismiss.

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Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of February one thousand nine hundred and sixty.

Present:

HON. CHARLES E. CLARK,
HON. CARROLL C. HINCKS,
HON. STERRY R. WATERMAN,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

DOMINICK MARCONE, ALFRED SACCO, ARCHANGELO NOIO,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed as to appellant Dominick Marcone; and reversed with a direction to dismiss as to appellants Alfred Sacco and Archangelo Noio in accordance with the opinion of this Court.

A. DANIEL FUSARO
Clerk